SUPREME COURT, U. S.

FILED

JUL 19 1966

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 366

DAVE ROSENBLOOM,

Petitioner,

—vs.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Dave Rosenbloom prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia, entered in the above-entitled case on April 27, 1966.

Citations to Opinions Below

The oral opinion of the Hustings Court of the City of Richmond, Virginia (T. 141-143)[1] is unreported and is printed in the Appendix, *infra,* p. 22. The Memorandum Opinion of the Hustings Court of the City of Richmond, Virginia is unreported and is printed in the Appendix, *infra,* p. 24.

[1] The symbol "T" refers to the transcript of the trial record in the Hustings Court.

Jurisdiction

The judgment of the Hustings Court of the City of Richmond, Virginia, was entered on June 11, 1965. Appendix, *infra*, p. 23. On April 27, 1966, the Supreme Court of Appeals of Virginia refused to grant a writ of error and supersedeas. Appendix, *infra*, p. 21. The jurisdiction of this Court is invoked under 28 U. S. C. A. § 1257(3).

Questions Presented

1. Whether the courts of Virginia failed to follow applicable decisions of this Court which have held that nudist publications, similar to the publications which are the basis of the conviction here, are not "obscene."

2. Whether the conviction of petitioner for exhibition and distribution of items consisting solely of nudist publications violates the First and Fourteenth Amendments to the United States Constitution.

3. Whether the nudist publications which were the basis of petitioner's conviction are "obscene."

Statute Involved

SEC. 18.1-227 AND SEC. 18.1-228, CODE OF VIRGINIA OF 1950, AS AMENDED

§ 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shame-

ful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. (1960, c. 233.)

§ 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—Every person who knowingly:

(1) Prepares any obscene item for the purposes of sale or commercial distribution; or

(2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or commercial distribution; or

(3) Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item, or offers to do any of these things; or

(4) Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item, shall be guilty of a misdemeanor. (1960, c. 233.)

Statement of the Case

Dave Rosenbloom, the petitioner herein, is the owner and operator of a retail book store, trading under the name The Booktrader in the City of Richmond, Virginia, at 211 North 7th Street, in the heart of the downtown business district. He sells a wide variety of books, from general publications to books with highly specialized or technical content (T. 54).

On October 23, 1964, a police officer, N. J. Hunt, purchased from the petitioner a nudist publication known as "Solis." Exhibit #1. The magazine is printed entirely in

the German language. The magazine was purchased because it was the understanding of Officer Hunt that, according to the Virginia statute, pictures of the human body with visible pubic hair are obscene (T. 30).

A few days after purchase, Lieutenant Russell L. Baughan, the head of the Vice Division of the Richmond Police Department, together with Officer Hunt, returned to Mr. Rosenbloom's store and seized all the nudist magazines that were on display. The magazines, 107 in all (Exhibit #2), were displayed in individually sealed plastic bags. All the magazines contained photographs of nude men, women and children at nudist camps, engaged in the usual activities of a summer camp such as swimming, volley ball, hiking, etc. The nudist magazines were the sole object of this police action (T. 34).

On October 27, 1964, Mr. Rosenbloom was arrested and charged with violation of Sec. 18.1-228 Code of Va. 1950 as amended, *supra*.

The matter first was heard in the Richmond Police Court where Mr. Rosenbloom was convicted and fined $200.00. It was appealed to Hustings Court, a trial court of record of the City of Richmond, and was tried by the court without a jury on March 22, 1965.

Officer Hunt and Lieutenant Baughan, the arresting officers, were the only witnesses offered by the Commonwealth at the Hustings Court trial. They testified on direct examination solely to the facts of the arrest. Except for the publications themselves, there was no evidence offered by the Commonwealth to prove that the publications were obscene.

Five witnesses, including the petitioner, testified on behalf of the petitioner: James C. Rogers, a social welfare worker, whose primary fields of study are psychology and sociology (T. 73); Mr. and Mrs. Walter Young, owners of a nudist resort in Virginia (T. 85, 101); James Jackson Kilpatrick, Editor of the Richmond News Leader, writer, and author of a publication dealing with obscene materials called "The Smut Peddlers" (Doubleday, 1960); and Dave Rosenbloom, the petitioner (T. 53). Their evidence went to prove that the magazines were not obscene under the law.

The social worker and owners of the nudist camp testified to the effect that, although the magazines contained unretouched photographs of nude men, women and children, they did not, in their opinion, have as their dominant theme an appeal to prurient interest. On the contrary, they were informative about nudist life and a desirable means of communication to those engaged in the nudist movement and of promoting the movement among others (T. 76, 90, 102, 103). Their testimony established that the material contained in the publications had redeeming social value.

James Jackson Kilpatrick's testimony was to the same effect: that there was nothing objectionable about the photographs except that the people were unclothed; that the ideas contained in the publication, though unpopular and distasteful to many, had redeeming social value which those in a free society have a right to advocate; and by reason of his profession and his familiarity with contemporary community standards, he believed that to the average person, the dominant theme of the publications taken as a whole did not appeal to prurient interest (T. 130, 132-134).

By written motion to quash and to dismiss the warrant, filed February 24, 1965 (R. 5),[2] the petition, among other things, moved the court in paragraph (d) (Appendix, *infra*, p. 31), to dismiss on the ground that the petitioner's right to sell the publications was a constitutionally protected right and privilege. The motion, when presented and argued at the commencement of the trial, was overruled by the Court and petitioner duly excepted.

Again, at the conclusion of the case, in its oral Opinion (T. 141-143; Appendix, *infra*, p. 22), and in its written Opinion (Appendix, *infra*, p. 24), the Court overruled the motion, to which exception was taken (R. 40; Appendix, *infra*, p. 27). The sole question, as stated by the Trial Court, was whether the publications were obscene (T. 37).

At the conclusion of the Commonwealth's evidence, the petitioner moved to strike the evidence of the Commonwealth on the ground that there was an applicable decision of this Court, namely, *Sunshine Book Co., et al.* v. *Summerfield*, 355 U. S. 372 (1958), that should be followed by the Trial Court (Appendix, *infra*, pp. 32-33). This motion was overruled by the Court, to which exception was made. The final written and oral opinion of the Court ignored this question completely (R. 8; Appendix, *infra*, pp. 22-26).

At the conclusion of all the evidence in the case, the Court directed counsel to submit written briefs (R. 40). Petitioner's brief urged the dismissal of the case against the petitioner on the ground that the rights of freedom of speech and press were protected by the First and Fourteenth Amendments to the Constitution of the United

[2] The symbol "R" refers to the Record in this case.

States and that the nudist publications were not obscene, as decided by this Court in *Sunshine Book Co., et al.* v. *Summerfield, supra* (R. 10-26). A compilation of exhibits and decisions in the series of cases that culminated in the final order in the *Sunshine Book Co.* case was submitted with the petitioner's brief and is part of the Record of this case.

The trial court, by order entered June 11, 1965, convicted petitioner and overruled motions to set aside the judgment as being contrary to the law and the evidence and to grant a new trial. Petitioner duly excepted (R. 40).

Notice of appeal and assignment of errors was filed, raising the same Federal questions with the Supreme Court of Appeals of Virginia. Order refusing writ by the Supreme Court of Appeals of Virginia is contained in the Appendix, *infra,* p. 21.

Reasons for Granting the Writ

1. In *Sunshine Book Co., et al.* v. *Summerfield,* 355 U. S. 372 (1958), this Court held that nudist magazines essentially identical to the ones involved in the case at bar were not obscene. Thus, the courts below, by convicting petitioner for selling and exhibiting such magazines notwithstanding *Sunshine Book Co.,* decided a federal question of substance in a way not in accord with applicable decisions of this Court. See too *Mounce* v. *United States,* 355 U. S. 180 (1958).

The State Courts were made aware of the *Sunshine Book Co.* case decision of this Court. During trial, when

motion was made to strike the evidence of the Commonwealth, the case was cited (T. 51; Appendix, *infra*, p. 33). At the conclusion of the trial, in the brief requested by the Court, the history of *Sunshine Book Co.* was set forth in detail from the time of its inception to the issuance of the *per curiam* order by this Court on January 13, 1958 (R. 14-15). Furthermore, the Court was furnished with copies of the nudist publications which were the subject of the *Sunshine Book Co.* case and with copies of the opinions of the courts which considered the case, from the initial stages through the final order of this Court (R. 16). The exhibits and decisions were made a part of the record.[3] Nonetheless, the *Sunshine Book Co.* case was never mentioned by the state courts, either orally or in the written opinions.

Sunshine Book Co. held that neither nudity nor photographs that show pubic hair are *per se* obscene. Other cases, which were also brought to the attention of the courts below (R. 13, 18, 19), have also held that nudist magazines are not obscene: *Mounce* v. *United States*, *supra*;[4] *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940).

2. The petitioner has shown that the applicable cases of this Court, particularly *Sunshine Book Co.*, have held that nudist publications are not obscene. Even if this were

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[3] A comparison between the magazines which were the subject of the *Sunshine Book Co.* case and those which are the subject of the instant case reveals that they are substantially identical. They all contain unretouched photographs of nude men, women and children, which show pubic hair.

[4] The nudist publications involved in *Mounce* included, among others, the Magazine "Solis," the very magazine purchased by the arresting officer in this case.

not so, the facts of this case are such that the publications are not obscene within the meaning of *Roth* v. *United States*, 354 U. S. 476 (1957).

James C. Rogers, a witness for the petitioner, a social welfare worker employed by the City of Richmond, and a free-lance writer for nudist publications, testified that nudist publications are published "to foster communication between people who are interested in the nudist movement and further to inform other people who might be interested in the benefits to be derived from nudism" (T. 76). In the interest of brevity, the impressive background of Mr. Rogers should be noted in the transcript (T. 73).

He testified further that "there are approximately 125 nudist resorts or groups . . . organized throughout the country." Throughout his testimony he stressed " . . . the benefits of nudism and the process of developing a healthy mind and a healthy body by the honest approach to life . . . " (T. 81).

Mr. and Mrs. Walter Young, owners of a nudist resort in Virginia, testified that their resort is called Buck's-Kin Lodge, is located 18 miles from Winchester, Virginia, and when first established in 1952, it "shook Frederick County to the roots" (T. 86), but now they are well accepted. They have raised six children in the nudist philosophy, four girls and two boys. Three girls are married and the Youngs have three grandchildren.

Mrs. Young testified to the effect that, on the average, 3,000 to 3,500 campers annually come to their resort, with 50 to 100 families from Richmond. Nudism is an international movement and they have visitors from many countries (T. 87).

To the question, "Would you tell us the purpose and the principles of the practice of nudism, as you understand it?", Mrs. Young's reply was:

> "Well, first, there is nothing wrong with the human body, and I—we believe that we should have on all parts of you the sun and air, that a healthy mind and a healthy body is what we wish. Children brought up in nudism are not candidates for delinquent courts. There's quite a bit, I believe— It keeps families together. Today we tend to—mother goes one place, father another, children another. This is a family recreation. We swim, play volley ball, table tennis, any of the sports. You go on nature walks, and it just—a family has their recreation together stays together" (T. 88).

Further, Mrs. Young testified that there are several organizations that foster nudism including the American Sunbathing Association and the National Nudist Council; that the attitude of the national organizations toward public education regarding the principles of nudism is very strong and that they use the magazines and word of mouth to make as many converts as possible. She further stated that the magazines disseminate information about the various facilities that are available and the functions which occur there; that inter-club news is a good portion of the publications. When questioned as to whether, in her opinion, photographs in nudist publications should be retouched, she said (T. 91-92):

> "A. I don't believe they should be retouched, because by being retouched they make us hypocritical; they also draw attention to exactly what we don't wish to draw attention to.

Q. Have you noticed anything that you consider to be obscene in these publications? A. No, sir, I have not.

Q. Do you feel that these publications have a social value? A. Yes, sir.

Q. And that is in the nature of the information that they disseminate and the interest that they create? A. Yes, sir.

Q. What about the printed material that appears in some of the magazines? A. I think it is very good, I think it tells us—answers the question that the average person would be asking about nudism itself."

The testimony of Mr. Young reinforced the testimony of his wife. He testified, in part, as follows (T. 101-102):

"Q. Have you looked and seen other nudist magazines over a period of time? A. I expect I have two thousand at home.

Q. What is their function? A. Their function is to disseminate information amongst the camps and to the general public at large, to assist in fostering the acceptance of the nudist philosophy.

Q. What is the nudist philosophy as you understand it? A. Well, very basically and briefly, it is the healthy mind and a healthy body, and one has to have mental, moral and physical well-being to be a thoroughly healthy person, it takes equal shares of each to make one a fully balanced and thoroughly healthy person.

Q. Is the philosophy completely accepted by the American public at large. A. No, unfortunately, it is not—it is a slow educational process.

Q. Is one of the functions of the associations to encourage such education? A. Yes.

Q. What role do the magazines of the kind generally known as nudist magazines play in this general education? A. They play a very important role in this education.

Q. How do they do that? A. By disseminating this information to the general public in all areas in which it is not stifled.

* * * * *

"Q. You are the owner of the lodge and you are a practicing nudist? A. Yes.

Q. Now, in that capacity, can you tell us of any other social value that the publications have in addition to the general dissemination of information to the public? A. Well, that is the principal value as I see it, they also in a minor way serve as an inter-club and inter-association dissemination of information—

Q. Do most of the magazines also list directories of the various lodges and camps? A. Some do, some don't, it isn't a hard and fast rule, it is entirely up to the publisher and I would say that the majority of them do issue directories.

Q. What would your reaction t such magazines be if the pubic areas of the persons depicted were blocked out, the hair brushed out. A. Well, it would certainly be a very hypocritical approach to the philosophy we are trying to foster."

James Jackson Kilpatrick, Editor of the Richmond News Leader, one of Virginia's leading newspapers (T. 122), Vice-Chairman of the Virginia Commission on Constitutional

Government, draftsman of the present statute on obscenity (T. 127), authority on the subject of obscene materials, and writer of national distinction (T. 124), testified, after having examined the publications charged as being obscene (T. 129), that in his opinion the nudist publications were not obscene (T. 130).

This opinion came after Mr. Kilpatrick was asked a question which established the foundation for his expert opinion (T. 130). On the basis of this question, which included all the standards by which obscenity is to be judged, the publications were put to a most exacting test and passed without reservation or qualification.

On cross-examination, Mr. Kilpatrick established that he was not a nudist (T. 131); that it is distasteful to him (T. 138). He further stated that the Commonwealth "Exhibit No. 1," "Solis" magazine, and "Exhibit No. 2," the other nudist magazines that he examined, were not obscene (T. 132):

> "A. This Exhibit 1, may it please the Court, is a German magazine that's been out for a number of years. This is an old magazine, it comes out periodically and I remember taking some notes on it at the time that I was doing research on my book. It figured in an earlier case involving customs and the importation of it into this country, and was involved in one of the court cases holding that photographs that show the pubic hair could be imported; up to that time they had been excluded by customs as obscene and that ruling was reversed. And so this magazine figured at that time in it. I don't read German myself, at least not at all fluently

—the magazine appears to consist almost entirely of articles related to nudism. I can make that much out of it, together with these unretouched photographs, all of women except one, two, three, four, all but four. This other magazine appears at first glance to be entirely typical of these publications. While some of the photographs appear to have been posed for photographic purposes, that is professional photographic purposes, most of them appear to be in the field of snapshots, candid camera items. These two are unretouched and show the pubic hair, and they appear to be predominantly women, though in a few of the photographs children and men appear. It contains a directory of nudist camps as most of them seem to do, and I direct the Court's attention to this aspect of it, that none of these magazines contain the dirty little ads back in the back where you are supposed to send off your dollar to get the filthy pictures. You simply don't find those in these nudist magazines. I did—Mr. Horwitz was good enough to furnish me with this publication here, the Nudist Annual, I understand a duplicate copy of it was among those received, and I did go through this one and made some annotations on the major articles and, Your Honor, the articles are just as wholesome as they can be. The first article in this happens to deal with the hats that are worn at nudist camps. It's a light and a feature story, what we would carry on our women's page. The next one is an article entitled, 'The View From My Window,' and it deals with the family development of a nudist farm in Wisconsin and how they raised it up from scratch. Then comes a feature article called, 'How To Live On Love,'

which has a provocative title, but this is in a light vein concerned with the economics of nudism, that you don't have to buy so many clothes, so you save money. Another article deals with Woodland Acres, a nudist camp in northwest Illinois and again this is a how-we-built-it-up sort of thing, basic facts about nudism. The important thing about it is that there is not an erotic line in any of these things; there isn't a suggestive pose, there isn't a suggestive or salacious situation. When the couples are posed together, to the ordinary eye they appear to be husband and wife. There is simply nothing in this of a, in my opinion, a prurient, morbid, shameful, dirty, filthy nature. On the contrary, it's just sunshine and unclothed people, and it's a rather wholesome article, it's about what the organizations do. I have not gone through others, many of them still sealed up, but I have in the course of my work in this field gone through dozens of them, so I suppose—" (T. 132-134).

He testified, with respect to the redeeming social value, as follows (T. 138):

"What was said by the other witnesses merely to make the point that in my own view the law on it is clear and if there is any redeeming social value in an idea anywhere you have a right, however unpopular or distasteful as this nudism is distasteful to me. I wouldn't have any part of it, but it is an idea that is held by a good many thousands of people, and as I understand the nature of a free society, they have a right to advocate that idea, if it has any redeeming social importance, and I am willing to concede that social nudism

may have for some people some redeeming social importance. I believe they have an idea, they have a right to use these publications to advance their ideas, however much I may disagree with them."

Mr. Rosenbloom's testimony went to the point that he conducted his business properly and carries a wide variety of books (T. 53-54):

"Q. And you regard the book business as being an honorable profession? A. Yes, I certainly do.

Mr. Wilkinson: Judge, we will stipulate that the book business is an honorable business.

The Court: Well, I don't think—

Q. All right, now, will you tell the Court what kind of books you carry? A. Well, I believe that we have one of the most varied assortments anywhere in the area. We have textbooks, books preparation for civil service, government exams, we have some fiction, we have dictionaries, we have dictionaries and school books, in about seven different languages, for which we have regular calls, in Spanish, French, German, Italian, Russian and possibly one or two others."

There was no criticism of the manner in which Mr. Rosenbloom conducted his business. In fact, it was brought out that each of these publications was individually wrapped. There was no evidence of any promotional activity of these magazines.[5] Mr. Rosenbloom in fact testified

[5] Cf. *Ginzburg v. United States*, 383 U. S. 463 (1966).

that there was no greater demand for them than for any others that he has, and that they are "just another phase of business" (T. 66).

The importance of this case transcends the fate of a single bookseller who is called upon to pay a fine of $25.00 and denied the right (and, therefore, the profit resulting therefrom) to sell nudist publications. The greater import concerns the nudist movement and the rights of people all over the United States who are involved in it. The witness, Mr. Rogers, social worker and writer, and Mr. and Mrs. Young, owners of a nudist resort, gave dramatic evidence of the struggle which the movement has undergone and is still undergoing to achieve even a modicum of status. The need to clarify its purposes and to educate the general public of their way of life is basic to the movement. To deny the movement the right to satisfy this need through the sale and distribution of publications contradicts what this Court has said in *Roth* v. *United States, supra* at 484-485:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

The Trial Court, which was not impressed with the argument that the nudist magazines are designed to foster the

emotional benefits to be obtained from nudism, characterized the argument as "so much manure and so little grass" —and held that the material is "utterly without redeeming social importance" (R. 38).

To allow this holding to stand—and with it the view of the Supreme Court of Appeals of Virginia that the holding was "plainly right" (R. 38; Appendix, *infra*, p. 21) —nullifies the authoritative evidence presented to the contrary.

3. The Virginia courts committed further error by misapplying the standards of the *Roth* case to support the finding that nudist publications are obscene. *Roth* was the very case this Court cited in the *per curiam* order in *Sunshine Book Co., supra,* that declared nudist publications not obscene and allowed them to be freely mailed. As has been shown, nudist publications do in fact have social importance and under *Roth* are not obscene.[6] See also *Parmelee* v. *United States, supra; Sunshine Book Co.* v. *Summerfield, supra; Mounce* v. *United States, supra; Manual Enterprises* v. *Day,* 370 U. S. 478 (1962); *Jacobellis* v. *Ohio,* 378 U. S. 184 (1964); *Memoirs* v. *Massachusetts,* 383 U. S. 413 (1966).

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[6] It is of interest that the Virginia statutes were based upon the American Law Institute Model Penal Code which was cited with approval by this Court in *Roth, supra* at 487, n. 20.

CONCLUSION

It is respectfully submitted that the conviction of the petitioner violates his constitutionally protected rights of freedom of speech and press, and that the State Court's judgment should be vacated. The denial of the petitioner's rights is tantamount to the denial of the same rights to others who have an interest in the unfettered distribution of their publications. For the foregoing reasons, it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

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July 1966

APPENDIX

OPINIONS BELOW

Order of the Supreme Court of Appeals of Virginia

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

The petition of Dave Rosenbloom for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 11th day of June, 1965, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A Copy,

Teste:

H. G. TURNER
Clerk

Oral Opinion of the Hustings Court of the City of Richmond, Virginia

Entered June 11, 1965 (T. 141-143)

The Court: Gentlemen, the Court has considered the memorandums of counsel for Mr. Rosenbloom and for the Commonwealth and has conducted its own investigation of the law and consideration of the record. I have passed to the counsel for the defendant a memorandum of the statutes that are involved and of the United States Court decision, which I think is applicable to the case. I first as I have said in there, to constitute an offense under the statute the evidence—have to establish beyond a reasonable doubt that the magazines considered as a whole have as their dominant theme or purpose an appeal to prurient interest, have a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in describing or representing of such matters. That is the definition as set forth in the statute and that is the controlling definition that the Court has to be guided by and I first, of course, have to find that the defendant knowingly sold these items or had in his possession such items.

I hold that the magazines exhibited in the evidence are obscene as defined by the statute, and, second, that the motions to quash the warrant and suppress the evidence is denied, primarily, of course, by the fact that if I find that they are obscene or lewd, the law is that they are not protected by the First and Fourteenth Amendments, and the Supreme Court has taken the position, our Supreme Court in the Roth case, has held in defining obscenity that the

material utterly without social importance as a test, and as a test is whether average persons applying community standards the dominant theme of the material as a whole appears to prurient interests. I am not impressed with the argument that it is benefits—emotional benefits—to be derived from nudism is of sufficient social importance to relieve him of that absolutely, and I find that he had them in his possession and he offered them for sale.

All right stand up. The Court finds you guilty as charged and sentences you to pay a fine of twenty-five dollars. I will say this Mr. Horwitz, you certainly did prepare an exhaustive brief and the judgment of the Court is largely guided by the definition of our Virginia statute.

Memorandum Opinion of the Hustings Court of the City of Richmond, Virginia

Entered June 11, 1965

MEMORANDUM OPINION

The following Sections of the Code are the basis of the complaint against the defendant:

ARTICLE 3

Obscenity

Section 18.1-227. *"Obscene" defined.*—The word "obscene" where it appears in this article shall mean that which considered as a whole has as its dominant theme or purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

Section 18.1-228. *Production, publication, sale, possession, etc., of obscene items.*—"Every person who knowingly:

(1) • • • or

(2) • • • or

(3) Publishes, sells, rents • • • or commercially distributes or exhibits any obscene item, or offers to do any of these things or

(4) Has in his possession with intent to sell, rent, lend, transport or commercially distribute any obscene item shall be guilty of a misdemeanor. Possession in public or in a public place of any obscene item as defined in this article

shall be deemed prima facie evidence of a violation of this section."

Section 18.1-229. *Obscene items enumerated*—Obscene items shall include:

(1) "Any obscene book; or

(2) Any obscene leaflet, pamphlet, magazine, booklet, picture, painting, drawing, photograph, film, negative, slide, motion picture; or

(3) Any obscene figure, object, article, instrument, novelty device or recording or transcription used or intended to be used in disseminating any obscene song, ballad, words or sounds."

OPINION OF COURT

To constitute an offense under the statutes the evidence must establish beyond a reasonable doubt:

(1) That the magazines considered as a whole have as "their dominant theme or purpose an appeal to prurient interest, that is a shameful or morbid interest in nudity, sex or excretion: and if it goes substantially beyond customary limits of candor in description or representation of such matters."

(2) That the defendant knowingly:

(a) • • • sold, exhibited or commercially distributed an obscene item; or offered to do any such thing.

(b) Or had in his possession, such obscene items with intent to sell or commercially distribute.

The Court holds:

I. That the magazines exhibited in evidence are "obscene" as defined by the statutes.

II. Motions to quash the warrants and suppress the evidence is denied.

That neither the First and Fourteenth Amendments of the Constitution of the United States nor Article 1, Section 12 of the Virginia Constitution affords protection from State action against obscene material.

Roth v. U.S., 354 U.S. 476; 481.

The Constitution does guarantee freedom for ideas "having even the slightest redeeming social importance; even unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of public opinion."

However the United States Supreme Court has defined obscenity as material "utterly without redeeming social importance" and as a test "whether to the average person, applying community standards, the dominant theme of the material as a whole appeals to prurient interest."

Roth v. U.S., 354 U.S. 476; 481.

It has been stressed by the defendant in argument that the magazines are designed to foster the emotional benefits to be obtained from "Nudism"—to produce Healthy Minds and Bodies. The Court is not impressed with that argument: "so much manure and so little grass." It holds that the material is "utterly without redeeming social importance".

III. That the Defendant, had in his possession and exhibited and sold such obscene items in his store in the City of Richmond open to the public.

IV. That Defendant knowingly so acted; and offered them for sale.

SAM B. WITT, JR.

Exceptions Noted to Orders of the Hustings Court of the City of Richmond

Trial March 22, 1965

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

Pleas at the Courthouse of the City of Richmond, before the Hustings Court of said City, on the 12th day of August, 1965.

Be it remembered that heretofore, to-wit: on the 22nd day of March, 1965, the following order was entered:

APPEAL

COMMONWEALTH

vs.

DAVE ROSENBLOOM,

Defendant.

Judge Witt

The said defendant this day appeared and was set to the bar in the custody of the Sergeant of this City. And the said defendant moved the Court to suppress the evidence in this case and to quash the warrant, which motions the Court doth overrule and the said defendant excepts. And being then arraigned, the said defendant pleaded not guilty to violating Section 18.1-228 of the Code of Virginia in that he did have in his possession and exhibit for the

purpose of selling certain obscene books and he did sell one obscene book to Police Officer N. J. Hunt, as charged. And with the consent of the accused, given in person, and the concurrence of the Court and the Attorney for the Commonwealth, the Court proceeded to hear and determine this case without a jury. And having heard the evidence for the Commonwealth, the said defendant moved the Court to strike the evidence for the Commonwealth as being insufficient for the finding of a judgment of guilty, which motion the Court doth also overrule and the said defendant excepts. And having heard all of the evidence, this case is continued to a later date for submission of written briefs by the Commonwealth and the defense. And thereupon the said defendant is released on continuing bail.

Hearing, June 11, 1965

VIRGINIA:

IN THE HUSTINGS COURT OF THE CITY OF RICHMOND

And at another Hustings Court held for the City of Richmond, at the Courthouse, on the 11th day of June, 1965, the following order was entered:

APPEAL

COMMONWEALTH

vs.

DAVE ROSENBLOOM,

Defendant.

Judge Witt

The said defendant this day again appeared and was set to the bar in the custody of the Sergeant of this City. And having plead not guilty to violating Section 18.1-228 of the Code of Virginia in that he did have in his possession and exhibit for the purpose of selling certain obscene books and he did sell one obscene book to Police Officer N. J. Hunt, as charged, and the Court having heard evidence and this case having been continued for the submission of written briefs by the Commonwealth and the Defense as entered herein on March 22, 1965, and said written briefs having been submitted, the Court doth this day find the said defendant guilty as charged and doth assess his fine at twenty five dollars.

Whereupon the said defendant moved the Court to set aside its judgment as being contrary to the law and to the evidence and grant him a new trial, which motion the Court doth overrule and to which action of the Court in overruling his said motion, the said defendant notes an exception, and time is allowed him not to exceed sixty days in which to file his bills of exceptions.

Whereupon it is considered by the Court that the said Dave Rosenbloom pay and satisfy a fine of twenty five dollars and costs.

The said defendant then moved the Court to suspend the execution of the said sentence to allow him to appeal his case to the Supreme Court of Appeals of Virginia for a writ of error and supersedeas, which motion the Court doth grant and the execution of the said sentence is suspended to August 11, 1965, and his bond is set at one hundred dollars.

And thereupon the said defendant entered into a recognizance in the sum of one hundred dollars, cash security, furnished by himself, conditioned that if the said defendant shall abide by and perform the judgment of this Court in the event the Supreme Court of Appeals of Virginia shall refuse to grant him a writ of error and supersedeas, or if granted it be later dismissed and appear before this Court on August 11, 1965, and in the meantime shall keep the peace and be of good behavior and violate none of the laws of this Commonwealth, then this recognizance to become null and void, else to remain in full force and virtue. And thereupon the said defendant is released.

Motions Made by Petitioner

Excerpt from Motion to Quash, filed February 24, 1965:

"Defendant . . . respectfully moves the Court to quash and dismiss the warrant filed against him . . . for the following reasons:

* * * * *

d. That the publications which the defendant is accused of possessing, offering to sell and selling are, as a matter of law, not obscene and therefore are privileged under Amendment I to the Constitution of the United States of America and § 12 of the Constitution of Virginia.

Oral Motion to Strike the Evidence

(T. 51, 52)

Mr. Horwitz: I think the Commonwealth is willing to stipulate that the law governing this case is a decision handed down by the Supreme Court, Sunshine Book Company et al. v. Summerfield, in 355 U. S. 372, in which the subject of nudist magazines was adjudicated.

Mr. Wilkinson: Judge, I don't stipulate law, because I don't think that it's a case there. I understood about the Matt case and some other cases—that the law—I mean, we don't have to stipulate that.

The Court: I don't think you have to stipulate it either—

Mr. Wilkinson: If that is the law then that is the law. The Court might disagree with the law—

Mr. Horwitz: I make the motion to strike the evidence of the Commonwealth based upon their evidence and when applied to this law which is clearly set out, that the nude human figure supposedly showing the genital area and pubic areas is not per se obscene; that nudist magazines are subject to mailing privileges and this was the reason for this case; that the evidence of the Commonwealth at this point is based on—

The Court: Mr. Horwitz I have—I must frankly admit that I am not familiar with the case, but you are making a motion, and I will, of course, consider any authority that you have in support of it, but I am not going, at this time, strike the Commonwealth's evidence. I will overrule your motion and you may have an exception.

Mr. Horwitz: Yes, sir.

The Court: But I would like a reference to your case, what is it, Sunshine— What—

Mr. Horwitz: Sunshine Book Company et al. v. Summerfield, 355 U. S. 377—372.

The Court: 355 U. S.

Mr. Horwitz: 372.

The Court: 372. All right.

Mr. Horwitz: I would also like to cite the cases that preceded that—

The Court: Well they are cited in that case, I imagine, all right, sir, but I will overrule your motion at this time.

In the

Supreme Court of the United States

October Term, 1966

No. 968

DAVE ROSENTHAL,

Petitioner,

—vs.—

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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City Hall—Room 400

Richmond, Virginia 23219

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 366

DAVE ROSENBLOOM,

Petitioner,

—vs.—

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Commonwealth of Virginia prays that the petition for a writ of certiorari be dismissed in the above styled case.

STATEMENT OF FACTS

The defendant, Dave Rosenbloom, hereinafter sometimes referred to as the petitioner is the owner and operator of a retail bookstore in the City of Richmond, Virginia, and trades under the trade name of The Booktrader. In his business he sells various and numerous books and magazines.

Officer N. J. Hunt on October 23, 1964, entered the petitioner's store and purchased from him a magazine entitled "Solis" which is written entirely in the German language

and has many pictures of nude women, men and children. Most of the pictures in the magazine are of young shapely women and exposes their bodies in its entirety without any clothing.

Subsequent to the purchase of the magazines the search warrant was obtained by the police and 107 magazines were confiscated under the search warrant and all of them so seized were the so-called nudist magazines. The magazines in question were wrapped in a transparent wrapper and the prices were greatly increased over the publisher's suggested retail price. The defendant admits that these magazines were not purchased in Richmond, Virginia but came from California and New Jersey and that he had paid for these magazines by check.

The petitioner was arrested and charged with violation of Section 18.1-228, the Code of Virginia, 1950 as amended.

Since the testimony and proceedings in the lower court is covered by the petition for a writ of certiorari they will not be reiterated at this time because it would only be redundant and unnecessary. The code sections in question are also in the petitioner's brief.

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

The definition of obscenity is found in Section 18.1-227 of the Code of Virginia, 1950 and is as follows:

> "§ 18.1-227. 'Obscene' defined.—The word 'obscene' where it appears in this article shall mean that which considered as a whole has as its dominant theme of purpose an appeal to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters."

It is apparent from reading the Roth case and the above statute that the statute was taken from the Roth decision. It appears that all the Court has to do is determine whether the magazine in the evidence comes within this decision and if so then the material is obscene and does not come within the protection of the free speech and press in the state or federal constitution. From casual observation it is apparent that the magazine seized by the police fall within the definition of obscene as defined in the Virginia Code. The overwhelming amount of the pictures are of nude women, many of them being in suggestive positions and appeal to a shameful and morbid interest in nudity, sex or excretion, and goes substantially beyond customary limits of candor in the description and representation of such matters. The pictures in the magazines in no way bring or aid in bringing about political and social changes desired by the people.

The Arkansas Supreme Court in the case of Gent v. State decided May 2, 1965, held the following in light of *Jacobellis* v. *Ohio,* 378 U.S. 184:

> "Perhaps we lack sophistication, but, to us, articles, which, for example, indicate that our colleges are simply play-grounds for the indulgence of sexual pleasures, are completely obscene, and totally without any redeeming feature. Of course, we are not cognizant of the standards of Washington, New York, Chicago, or San Francisco, nor is there any way for us to know the 'standard' of the nation at large, but we think the evidence clearly established that the contents of the magazines in question are not compatible with the contemporary community standards in Pine Bluff, Arkansas."

These pictures go far beyond the community standards of decency of the Commonwealth of Virginia in general and the City of Richmond in particular and have no redeeming social value.

All of the witnesses called by the defense stated that they

felt it would be wrong for a nude woman or man to appear in public. In fact, they agreed that society should be protected from this action. It is hard to distinguish a live person from the pictures appearing in the magazine.

Two witnesses called by the defendant who were nudist and ran a nudist camp testified that their membership was restricted and a person could only attend the camp after making application thereto and it being approved by the owners of the camp. They further testified that their camp was run away from the public view and the only way you could gain admittance was by invitation from the owners. The Commonwealth contends that this testimony by witnesses called on behalf of the defendant proves beyond a reasonable doubt that the public at large must be protected in such matters.

The Court has no right to interfere with beliefs and thoughts and the communication of these beliefs and thoughts from person to person so long as it does further some social or political belief. However, the law may regulate certain actions for the safety of the public in the furtherance of such beliefs. In the case of *Kirk* vs. *Commonwealth,* 186 Va. 839 at page 845 our Court said the law cannot interefere with a person's religious beliefs or opinions *but* this is no excuse for illegal actions made criminal by the law of the land even though such act is based on conscientious religious belief. The Court then cited with authority the following:

> "As said by Chief Justice Waite in Reynolds vs. United States, 98 U.S. 145, 25 L. Ed. 244, 250: 'Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. * * * Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed

> doctrine of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.' See also, *Jones* v. *Opelike*, 316 U.S. 584, 62 S. 1231, 86 L. Ed. 1691."

The guarantee of the constitution of Virginia and the United States, so far as freedom of religion, speech and press, are very similar in their application and neither should be suppressed by the government unless there is a clear, concise and public need so to do and this should be only exercised when the public demand is so great that it is absolutely necessary for an orderly society to survive. The Commonwealth contends that people may practice nudism, read and exchange ideas, but the public has a right to keep the rattle snakes of obscenity out of the public square where its venom will poison the minds of men, women and children and materially affect the moral beliefs of the people. Public morality has been the cornerstone of our republic and must be protected.

It appears the sole question for the court to decide is where society draws the line between what is for the furtherance of a political or social change and the protection of the people at large. From the evidence it is clear and beyond any doubt that the people who are dedicated to their beliefs readily admit that public at large has not reached a point where it can adequately accept the pictures of nude women being sold from every drug store, confectionary and bookstore within our City, State and Country.

To say that these magazines are not obscene would allow persons to go one step further and actually show by pictures the most intimate relations between men and women under the theory that this is for a social purpose. This would open the flood gates to obscenity which would materially alter the moral standards and beliefs of the people of this country.

The idea that these magazines are for the purpose to assist nudists in their beliefs is so much manure and not enough grass.

The New Jersey Superior Court held on December 9, 1964, in *G. P. Putnam's* v. *Galissi* in granting the County Prosecutor an injunction banning the sale of "Fanny Hill" the following:

> "Free rein should not be given under the guise of constitutional guarantees to vilely depict perversions and sexual adventures as John Cleland author of Fanny Hill saw fit 200 years ago. This is not the highway to a better constitutional world; it is rather the path to decay and decline. The Constitution should not be the sword of a shameful profiteer of filth. It must be the shield to protect our sense of moral decency."

The cases cited by the defendant only show that a person is entitled to his day in court, which the defendant has had here. The burden rests on the state to show that the material is obscene and not upon the defendant to prove they are not. In the instant case this was done.

The nudist idea behind these magazines is only subterfuge and is not the real issue before the Court. To be a nudist or not lies within a man's own conscience, but the sale of such magazines in public is a matter of all the people. As long as the Virginia Obscenity statute is constitutional then these magazines come under it for the protection of the people.

The defendant relies heavily on the *Sunshine Book Co., et al.* v. *Summerfield,* 355 U.S. 372 (1958). However, this case cannot be controlling as it is a per curiam decision by the Supreme Court and no reasons for the decision are set out in the opinion. To say that this Court approved all nudist publications by the above mentioned decision would

completely ignore other decisions of the Court.

The case against the commercial nudist magazine vendor is realistically portrayed by the Missouri Supreme Court in *State* v. *Volmar,* 389 S.W. 2d 20, at page 28:

> "All of the books purport to describe nudist organizations and to advocate the practice of nudity. However, we have concluded from an examination of the contents and arrangement of these books that the advocacy of nudity therein is a mere pretext or feint whereby publishers and distributors of obscene publications seek to avoid successful prosecution and punishment under obscenity statutes such as the one under consideration.
>
> All of the books are replete with actual photographs of nude persons of both sexes, many of which clearly depict both male and female genitalia, including the pubic hair. Some of the pictures show nude persons of all ages engaged in the normal group activities that apparently characterize the usual nudist park. However, predominating in all of these publications are close-up photographs of attractive, shapely, young women, most of them apparently range in age from 16 to 25 years. These photographs are posed so as to portray both the face and figure of these young women in a most alluring manner. Most of those photographs are of the front view and, as stated by one of the witnesses, 'show everything.' Some show one nude woman on a double page in order to depict a closer view of her body than could be done on one page. See, for example, "National Nudist," pages 27, 28. While these are not necessarilly poses suggestive of sexual intercourse, one would be naive indeed to conclude that pictures of that type would not arouse the prurient interest of the average man. A considerable number of the photographs are in color which, of course, make the nude person appear more natural and would likely increase the prurient appeal * * *

> While no doubt there are some people who sincerely believe that the practice of nudism is beneficial and desirable, it is unquestioned that we live today in a clothed civilization and the average normal American (regardless of where he may reside), except for legitimate works of art, etc., regards complete nudity, especially when it brazenly exhibits the adult male and female genitalia, as shocking, vulgar, and indecent. We have considered each of the exhibits in this case in its entirety and have concluded that each must be characterized as obscene. The dominant theme of each is to display the sex organs and nude bodies of attractive young people in a manner that will appeal to the prurient interest of the average person (applying contemporary community standards) in this nation. We accordingly rule that the trial court did not err in overruling defendant's motions for judgment of acquittal."

The holding in *Ginzburg* vs. *United States,* 383, U.S., 463 (March 21, 1966) cannot be overlooked in the decision of any obscenity case. To analyze the facts in the instant case we find the petitioner falls clearly within the holding of Ginzburg. How could the petitioner foster the nudist movement by a publication written solely in the German language when there aren't but very few persons in this locality who could read the publication. Therefore, the only benefit that this magazine could have would be the pictures which showed young women, men and children in the nude. The publications being wrapped in a transparent cover would make the buyer believe that the interior of the publications were much worse than the display of nudity and sex on the cover would indicate. This is the old "grab bag" game where the seller appeals to the prurient interest and "jacks up" the price which is nothing more than pandering and puts the publication in a category of a background of commercial exploitation of erotica solely for the sake of their prurient appeal.

A purchaser that came in to purchase the magazine "Solis" could not possibly know what was on the inside of the publication. The nude woman's picture on the cover of the magazine "Solis" appealed solely to the prurient interest of the purchaser and was so displayed to sell the magazine for an excessive profit. This Court in *Ginzburg* vs. *United States, supra,* stated:

> "If the object of a work is a material gain for the creator through an appeal to the sexual curiosity and appetite the work is pornographic."

The Court fully answers the questions involved in this case with the above quotation.

CONCLUSION

It is respectfully submitted that the conviction of the petitioner violated none of his constitutional rights of the freedom of speech and press as he was not a nudist himself, a writer for nudist magazines, nor did he believe in nudism and that the findings of the Hustings Court of the City of Richmond, Virginia and the Supreme Court of Appeals of Virginia should stand undisturbed and it is respectfully prayed by the Commonwealth of Virginia that the petition for a writ of certiorari be not granted. The State is not punishing for a belief or idea of the seller, but the act of pandering sex and nudity in the public square.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

ROSENBLOOM *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 366. Decided June 12, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment of the Supreme Court of Appeals of Virginia is reversed. *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.